

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

LANDSCAPE CONSULTANTS OF  
TEXAS, INC., and  
METROPOLITAN LANDSCAPE  
MANAGEMENT, INC.,

*Plaintiffs,*

v.

CITY OF HOUSTON, TEXAS, and  
MIDTOWN MANAGEMENT  
DISTRICT,

*Defendants.*

Civil Action No. 4:23-cv-03516

**PLAINTIFFS' SUMMARY OF  
OPPOSITION TO DEFENDANT  
CITY OF HOUSTON'S MOTION  
FOR SUMMARY JUDGMENT**

## SUMMARY OF ARGUMENT

Defendant City of Houston is not entitled to summary judgment as a matter of law and its Motion for Summary Judgment should be dismissed.

### **I. Plaintiffs Have Article III Standing**

Houston wrongly contends that Plaintiffs cannot establish the first prong of Article III standing, the injury in fact, because its MWSBE program does not disadvantage Plaintiffs. Dkt. 71 at 16–18, 20–22. Houston misunderstands the nature of Plaintiffs’ injury; in an equal protection challenge to a race-based public contracting program, the “‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a contract.” *N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 702, 719 (2007). Houston’s arguments to the contrary—for example, that Plaintiffs are not completely excluded from bidding, or that there is no mandatory penalty for failure to meeting MWSBE contract goals—do not change the fact that Houston’s racially discriminatory MWSBE program prevents Plaintiffs from bidding on an equal basis. Dkt. 71 at 16–17. *That* is Plaintiffs’ injury in fact, and it is sufficient for Article III standing. *N.E. Fla.*, 508 U.S. at 666; *W.H. Scott Const. Co. v. City of Jackson*, 199 F.3d 206, 212 (5th Cir. 1999).

Having established an injury in fact, Houston cannot limit Plaintiffs’ standing to challenging only “other services” contracts, rather than the MWSBE program as a whole. Dkt. 71 at 18–19. Houston presents no evidence that the city ordinance on which the MWSBE program is based is severable or that it administers its MWSBE policy differently for “other services” contracts as opposed to professional services, construction, or goods contracts. Further, Plaintiffs seek relief from the MWSBE program’s racial classifications. Dkt. 1 ¶¶ 47–55. These racial classifications determine which business owners are eligible to become certified as a minority business enterprise and enjoy a racial preference when bidding on Houston public contracts. Houston Code § 15-82. The administrative category Houston places landscaping companies in for purposes of bidding is irrelevant in this challenge to Houston’s use of racial classifications in its MWSBE program.

## **II. Houston’s MWSBE Program Fails Strict Scrutiny**

Houston does not argue that its current MWSBE ordinance and program are constitutional. Instead, it relies entirely on an unadopted, draft disparity study that plays no role in the creation or administration of the program that Plaintiffs challenge. Dkt. 71 at 25–38. Plaintiffs’ accompanying Motion to Strike explains why this Court should not consider this unadopted, draft study. Without it, Houston has no evidence of a compelling interest to support its race-based public contracting

program, and cannot show that the program is narrowly tailored to accomplish any compelling interest.

Houston presents no evidence of “specific, identified instances of past discrimination that violated the Constitution or a statute” because it admits that it is not aware of any racial discrimination within its MWSBE program. *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 207 (2023) (*SFFA*). With no evidence of discrimination to remedy, Houston has no compelling interest in operating a race-conscious public contracting program.

Houston’s narrow tailoring arguments are equally unfounded. It makes no attempt to show any “serious, good faith consideration of workable race-neutral alternatives” to the MWSBE program, and relies largely on the unadopted, draft disparity study that should not be considered by this Court. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); Dkt. 71 at 34–38. Houston fails to prove that the MWSBE program Houston *currently* operates, and which Plaintiffs challenge, is narrowly tailored.

### **CONCLUSION**

For the foregoing reasons, Houston’s motion for summary judgment should be denied and Plaintiffs’ motion for summary judgment, Dkt. 68, should be granted.

DATED: December 20, 2024.

Anastasia Boden  
*Of Counsel*  
Cal. Bar No. 281911  
S.D. Tex. Bar No. 3495077  
Joshua P. Thompson\*  
*Of Counsel*  
Cal. Bar No. 250955  
Pacific Legal Foundation  
555 Capitol Mall  
Suite 1290  
Sacramento, CA 95814  
Telephone: (916) 419-7111  
Fax: (916) 419-7747  
aboden@pacificlegal.org  
jthompson@pacificlegal.org

Respectfully submitted,  
s/ Erin E. Wilcox  
Erin E. Wilcox  
*Attorney-in-Charge*  
Cal. Bar No. 337427  
S.D. Tex. Bar No. 3369027  
Pacific Legal Foundation  
555 Capitol Mall  
Suite 1290  
Sacramento, CA 95814  
Telephone: (916) 419-7111  
Fax: (916) 419-7747  
ewilcox@pacificlegal.org

*\*Pro Hac Vice*

*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on December 20, 2024, I served this document via the Court's electronic filing system to Defendants' counsel of record as follows:

Lori Yount  
Senior Assistant City Attorney  
Darrah Eckert  
Senior Asst. City Attorney, General Litigation Section  
City of Houston Legal Department  
P.O. Box 368  
Houston, Texas 77001-368  
900 Bagby, 4th Floor  
Houston, TX 77002  
lori.yount@houstontx.gov  
darah.eckert@houstontx.gov

Ben Stephens  
Sandy Hellums-Gomez  
Jarett Dillard  
HUSCH BLACKWELL LLP  
600 Travis St., Suite 2350  
Houston, Texas 77002  
ben.stephens@huschblackwell.com  
sandy.gomez@huschblackwell.com  
jarett.dillard@huschblackwell.com  
*Counsel for City of Houston*

Brett J. Sileo  
Britton B. Harris  
Harris Hilburn P.L.L.C.  
1111 Rosalie  
Houston, Texas 77004  
bsileo@hhstxlaw.com  
bharris@hhstxlaw.com  
*Counsel for Midtown Management District*

s/ Erin E. Wilcox  
Erin E. Wilcox  
Pacific Legal Foundation